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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 85

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

BUZZY SKIDMORE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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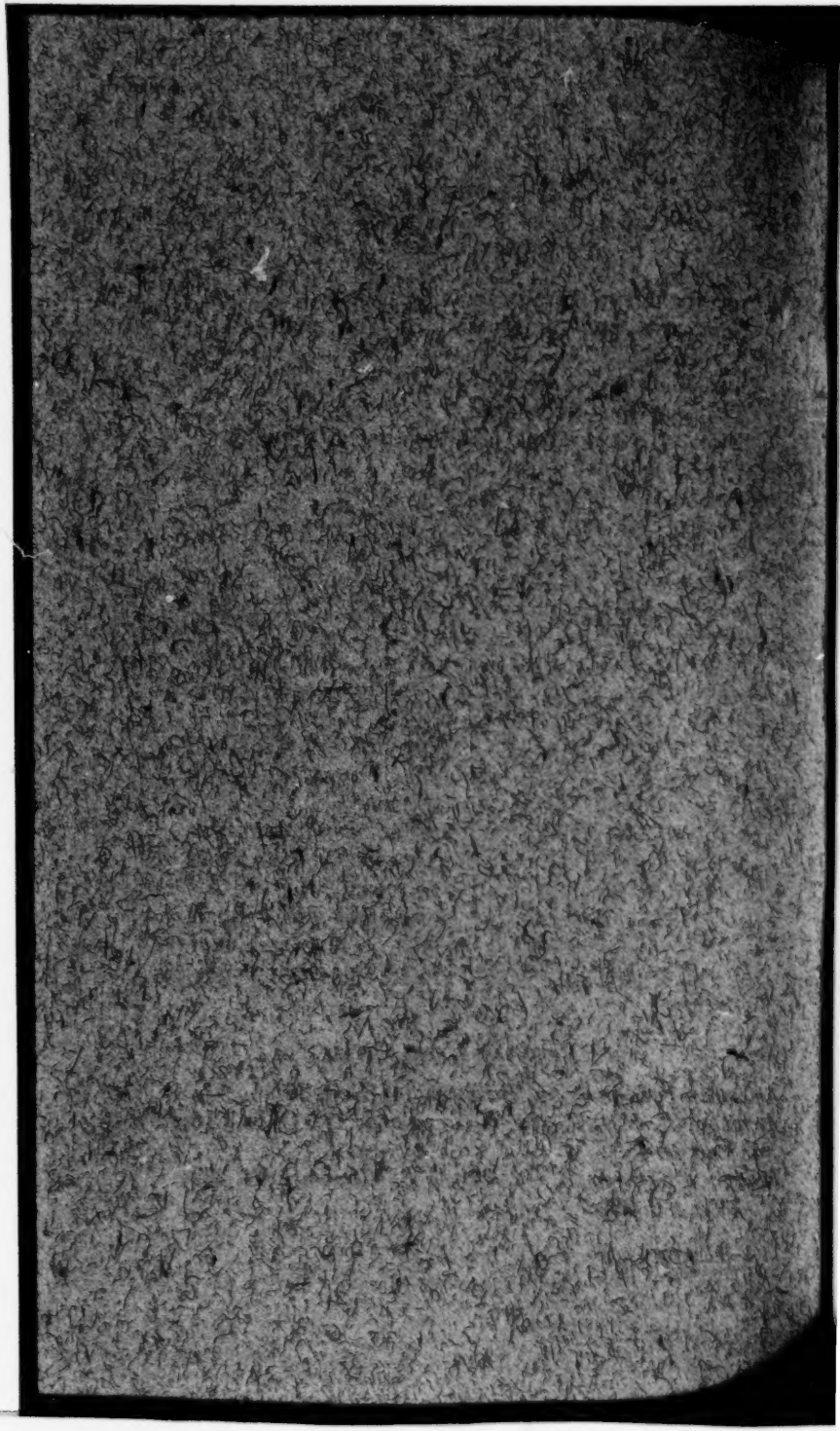

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SUPREME COURT OF THE UNITED STATES

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No. 857

THE BALTIMORE AND OHIO RAILROAD COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Baltimore and Ohio Railroad Company respectfully shows:

Summary Statement of the Matter Involved

This action was instituted under the Federal Employers' Liability Act (35 Statutes 65, 66) by the Respondent against

Petitioner to recover damages for personal injuries sustained when the knees of employee-respondent slipped apart on ice under a coal car under which he had been working since 7:30 in the morning on January 19, 1945, in petitioner's repair yards at Lorain, Ohio. The slipping occurred at 3:30 in the afternoon (R. 31, 44).

The action was tried before Hon. Robert A. Inch, and a jury in the Eastern District of New York and resulted in a verdict of $30,000.00. The judgment entered upon the jury's verdict was appealed to the United States Circuit Court of Appeals for the Second Circuit. That Court affirmed the judgment (R. 341).

Motion for a non-suit and for a dismissal of the complaint was made at the close of the respondent's case and was renewed and extended to a directed verdict at the close of all of the evidence. They were denied and exceptions taken (R. 175, 231). After the verdict the petitioner moved for a directed verdict or for a new trial. Motion was denied (R. 298). Before the charge, petitioner requested the Trial Court to submit written questions to the jury for written answers with respect to the negligence of the defendant, the contributory negligence of the plaintiff, and damages. Request was denied and an exception taken (R. Exhibit C, pages 295, 233).

Jurisdictional Statement

Judgment was entered by the Circuit Court of Appeals for the Second Circuit on the 15th day of March, 1948 (R. 341). This petition was filed on the — day of —, 1948. The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code (28 U. S. C., § 347).

By its decision herein and the judgment entered thereon the Circuit Court of Appeals for the Second Circuit "has decided a Federal question in a way probably in conflict

with applicable decisions of this Court." (Supreme Court Rule 38, Paragraph 5 (b).) *Missouri Pacific Railway Company* v. *Aeby*, 275 U. S. 426; 48 S. Ct. 177; 721 L. Ed. 351.

The Questions Presented

I

Whether Petitioner-Railroad was negligent by reason of the natural accumulation of snow and ice in an outdoor repair yard that is about one quarter mile long and about 700 feet wide and where 150 workmen are employed.

II

Whether the Petitioner-Railroad was negligent by reason of employee-respondent, an experienced car-man, choosing and pursuing a method of work which was improper and dangerous, and without instructions from his employer.

III

Whether there was an abuse of discretion by the Trial Court in refusing to submit to the jury, as requested by the petitioner, written questions calling for written answers by it as to the issues of negligence, contributory negligence, and damages.

Reasons Relied Upon for Allowance of Writ

(1) The Circuit Court erred in holding that

> "The evidence was sufficient to justify the jury in concluding (a) that defendant (petitioner) directed plaintiff (respondent) to work in the manner and at the place in which he worked, and (b) that defendant was negligent, in requiring plaintiff to perform such services when defendant had not cleared the snow and ice under the car (R. 311).

(2) The Circuit Court erred in refusing to hold that the slipping on the ice and resulting injuries were occasioned solely by the negligence of respondent.

(3) Although the Circuit Court found

> "undeniably, the verdict affords no satisfactory information about the jury's findings" (R. 311),

and also stated

> "we deem such a verdict (special verdict) usually preferable to the opaque general verdict" (R. 333);

that Court erred in holding

> "the Federal District Judge, under the Rule (Rule 49—Federal Rules of Civil Procedure), has full, uncontrolled discretion in the matter" (R. 332);

and in also concluding

> "Accordingly, we cannot hold that a District Judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict * * *" (R. 333).

WHEREFORE, your Petitioner, The Baltimore and Ohio Railroad Company, prays that a Writ of Certiorari issue to review the judgment entered in the above cause on the 15th day of March 1948, in the United States Circuit Court of Appeals for the Second Circuit, said cause being #20862 on the docket of said Circuit Court.

Respectfully submitted,

BALTIMORE AND OHIO RAILROAD COMPANY,
By WILLIAM C. COMBS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 857

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

BUZZY SKIDMORE,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinions Below

The Opinions in the United States Circuit Court of Appeals, Second Circuit (Circuit Judges L. Hand, Swan and Frank, Judge Frank writing, and Judge Hand concurring in separate Opinion) was filed March 15, 1948, and appears at page 308 of the Record. They are as yet unreported.

Jurisdiction

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code (28 U. S. C., § 347). The Circuit Court of Appeals has in this case "decided a Federal question in a way probably in conflict with applicable decisions of

this Court." (Supreme Court Rule 38, Paragraph 5 (b).)

Judgment was entered in this case by the United States Circuit Court of Appeals for the Second Circuit on March 15, 1948.

Statement of the Case

In addition to the facts already set forth in the preceding Petition at pages 1 to —— the following are pertinent: Respondent and his working partner, also a car-man, reported to work at 7:30 in the morning. As usual, they received a written work sheet of the work that was to be done that day (R. 31, Exhibit 11, R. 264). Such work required the installation of eight new doors on a four hopper coal car, two doors to each hopper (R. 40); Exhibits 1, 2 and 3 (R. 244-248). This work also required the replacement of four spreaders, one for each pair of doors (R. 44, Exhibits 3, 4 and 5, R. 248-252).

When Respondent and Beaver started work on the said coal car at 7:30 in the morning, they found eight new doors and the four original spreaders under the car (R. 38, 229, 230). Previously the eight old doors had been burned off the car by another crew (R. 38).

Respondent and Beaver proceeded to hang the doors, each weighing about 96 pounds (R. 48). At lunch time, 11:30, or very shortly thereafter they had finished installing the 8 doors (R. 66). Their duty was then to attach the 4 spreaders. They completed the affixing of three of the spreaders, and were in the act of raising the fourth one from the ground up to the bottom part of the doors when the alleged accident to respondent occurred (R. 66, 47-48).

The manner in which they were installing the fourth spreader was the same as for the first three (R. 66). The respondent was under the car on one side and Beaver was under the car on the other, out of sight of each (R. 66, 67). Each was on his knees with the spreader on the ground in

front of him width-wise of the car. The spreader weighed 190 pounds (R. 48). The operation to raise the spreader to its proper place at the bottom of the doors was much the same as the manner in which the doors themselves had been hung. Each man would lift his end of the spreader and key it with a bar into the corresponding hole near the bottom of the door. Bolts would then be inserted in the other corresponding holes (R. 48).

The respondent described the alleged accident in the following manner:

> "I was down on my knees on the hard, slick, slippery ice. When I lifted this door spreader up here my knees went down like that (indicating) and that jerked me down forward, and I felt a terrific snap back in the area of my spine down low (indicating)" (R. 48, 49).

Respondent testified that when it was necessary to patch old doors or to install new ones, it was the custom and practice to burn off only one door from each spreader, leaving the spreader attached to and suspended from the other door, thus eliminating the need of lifting the spreader from the ground in order to affix it to the new or patched doors. He also testified that when the entire car, both the doors and the spreaders, was burned off, it was the custom and practice to have the spreaders riveted onto the doors by another crew at the so-called bench, and to have a crane bring the two doors and the spreader as a unit to the car; that a jack could then be used to raise the unit, the two doors and the spreader, into place (R. 33-45).

Respondent's testimony as to the alleged custom and practice was contradicted by his foreman, John Wilson, and by his co-worker, Beaver (R. 207-209, 218). The petitioner's contention is that such question of fact is not pertinent or material under the facts of the case, as will be later discussed.

At no time from 7:30 in the morning until 3:30 in the afternoon on the day of the alleged accident did the respondent ask anyone for help (R. 66) or make any complaint respecting any icy or snowy condition or the manner of performing the work. Regardless of any custom or practice, the manner of performing the work was of respondent's own choosing, and it was pursued throughout the day. Nothing happened to the respondent until he was installing the fourth and last spreader at 3:30 in the afternoon (R. 66).

There is no claim on the part of the respondent that he received any oral or written instructions from anyone as to the manner in which any of the work was to be performed. He admitted, as is obvious from inspection, that the work sheet (Exhibit 11, R. 264) did not contain any instructions as to how the work was to be done.

> "Q. Mr. Skidmore, will you take Plaintiff's Exhibit No. 11 and read to the jury any instructions on that work card as to the manner in which this work was to be done if such instructions appear on that exhibit? A. Well, this is a work slip. It don't tell anything about how to do it" (R. 66).

Specification of Errors

The Circuit Court erred in holding that the Trial Judge properly denied the motion for a directed verdict or a new trial, and petitioner's request for a special verdict (R. 311, 340).

ARGUMENT

Point 1

Petitioner was not negligent because of the presence of snow and ice in its repair yard.

Petitioner's repair yard in which the respondent worked contained an area of approximately 1,000,000 square feet,

all exposed to the elements and subject to natural accumulations of snow and ice (R. 206). It is not claimed that petitioner maintained a custom or practice of clearing this yard of snow and ice, and it would be obviously impractical for it to attempt to do so. Moreover, no testimony was offered of any such custom or practice existing in similarly situated yards.

Respondent testified that there was snow and ice at the location where he was working (R. 41). He also testified that this condition was the same as existed throughout the petitioner's entire yard (R. 65); and this testimony was corroborated by his co-employee, Beaver, who stated that "it was all ice; everywhere" (R. 218, 219). Under these circumstances it must be held as a matter of law that the presence of snow and ice at the spot where respondent slipped constituted no evidence of actionable negligence.

So far as petitioner's counsel have been able to determine, the case of *Missouri Pacific Railway Company* v. *Aeby*, 275 U. S. 426; 48 S. Ct. 177; 72 L. Ed. 351 is the sole pronouncement of the Supreme Court of the United States on the liability of a railroad to its employee for snow and ice on its premises. There the platform of a railroad station was covered with ice and about three inches of snow on which the respondent, petitioner's station agent, slipped and fell. This Court, in reversing a judgment for the respondent, stated in part:

> "There is no liability in the absence of negligence on the part of the carrier. (Cases cited.) Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances. (Cases cited). The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. (Case cited). No employment is free

from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with snow and ice. Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. (Case cited). It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty to her."

Although the above case was decided in 1928 when the defense of assumption of the risk was still available under the Act, this Court expressly declared that its decision was not based on either that defense or the defense of contributory negligence. The Court stated at page 430:

> "The facts of this case, when taken most favorably to the respondent, are not sufficient to sustain a finding that petitioner failed in any duty owed. (Case cited). As negligence on the part of the petitioner is essential, we need not consider its contentions in respect of assumption of risk and negligence on the part of respondent."

Similar decisions have been handed down by a number of lower courts to which the same question has been presented in actions brought under the Federal Employers' Liability Act. See:

McGivern v. *Northern Pacific Railway Co.*, 132 F. (2), 213 (8th Circuit);

American Bridge Co. v. *Bainum*, 146 Fed. 367 (3d Circuit);

Wichita Falls & S. R. Co. v. *Wade*, Court of Civil Appeals of Texas, 57 S. W. 2d, 332;

Atchison, T. & S. F. Ry. Co. v. *Ford,* 171 Okla. 516, 43 Pac. 2d. 459.

See also:

Clark v. *Howard,* 88 Fed. 199 (8th Circuit).

One hundred and fifty men were working with the respondent in petitioner's yard during a winter of unusually heavy snow. On the day of the accident there were approximately five inches of snow on the ground (R. 43). To say that the petitioner was negligent whenever it allowed one of its men to step on some of this snow or ice lying on the ground would be to set up such a standard of care as to make the petitioner practically an insurer of its employees' safety. The Act imposes no such burden upon any employer.

POINT 2

Petitioner is not liable if a method of work of the respondent's own choosing was improper or dangerous.

Respondent testified that it was customary in petitioner's yard when all the doors were burned off a car to take the new doors and the spreaders to the door bench and rivet them together before attempting to place them on the cars (R. 35, 45). When respondent reported to work on the morning of the accident, he discovered that all the doors had been burned off a certain car; and he received a work slip (Ex. 11, R. 39, R. 264) calling for the installation of new doors. The work sheet contained no instructions as to the manner in which the installation should be made (R. 66).

Instead of following what he claimed was the customary practice of having the doors and spreaders riveted together before attaching them to the car, respondent, of his own volition and without instructions from anyone, adopted his own method of installation, a method which

he testified emphatically was an improper one and one he had never used before.

> "Q. Was it the proper way of doing that work?"
> A. No, sir. Absolutely not.
> Q. Had you ever, from the first moment, back in the 1920's, when you first went to work for the B. & O. Railroad, right down to the very day of the accident, had you ever done the work in that particular way when it involved the installation of all new doors? A. No, sir; never did" (R. 68).

There is no claim on the part of the respondent that the tools and equipment necessary to attach the doors in the customary manner were not available if he desired to make use of them. The crane, the door bench and the jack were all there to be used. Under these circumstances the petitioner cannot be held responsible for an unauthorized misuse of otherwise adequate facilities by the respondent himself.

It has never been held under the Act that an experienced employee can hold his employer responsible if the employee, himself, chooses an improper or dangerous method of doing his work. In such situations the employee's own negligence is held to be the sole proximate cause of the accident.

McGivern v. *North Pacific Ry. Co. supra.*

> "Temporary conditions created by employees using or failing to use appliances furnished by the employer are not defects for which the employer may be held responsible in damages."
>
> *Brady* v. *Southern R. Co.*, 320 U. S. 476; 64 S. Ct. 232; 88 L. Ed. 239;
>
> *Cartwright* v. *Atchison T. & S. F. Ry. Co.*, 228 Fed. 872 (8th Circuit);
>
> *Wolfe* v. *Henwood*, 162 F. (2d) 998 (8th Circuit).

The respondent's own testimony is that he followed an "improper" method of attaching the hopper doors. This

was contradicted by the testimony of the petitioner's witnesses (R. 207, 218). Assuming it to be so, however, there is not an iota of proof that he was directed by the petitioner to adopt such method. Certainly the petitioner cannot be held liable because it failed to prevent the respondent from doing the work in such manner as he, himself, chose.

Unadilla Valley R. Co. v. *Caldine*, 278 U. S. 139, 142; 49 S. Ct. 91; 73 L. Ed. 224.

> "A failure to stop a man from doing what he knows he ought not to do, hardly can be called a cause of his act."

As a matter of law, the negligence of the respondent was the sole proximate cause of any injury.

POINT 3

The negligence of Respondent was so glaring that it was an abuse of the Trial Court's discretion to refuse to have the jury answer written questions with respect to that and other issues, and such abuse is reviewable by an Appellate Court.

Considering all of the facts in this case, it is inescapable that reasonable men would conclude that the respondent was guilty of substantial contributory negligence. No one could have been more aware of the icy condition than Skidmore. As above recited, he worked all day under such conditions and for several hours he went through identically the same movements that he was performing when his knees slipped apart. He had sought no precautions whatever against that which he now wants this Court to believe was such an obvious and foreseeable danger.

It is respectfully submitted that if the jury had been called upon to answer the proposed written question as to the respondent's contributory negligence, it would have

been alerted to a conscientious and exacting consideration of that issue. If such had occurred, it is respectfully submitted that no reasonable jury could have failed to arrive at the conclusion that respondent was guilty of a substantial percentage of the total negligence.

The petitioner did request the Trial Court to submit such questions in the form proposed or in substantially such form (R. 233, Exhibit C for identification, R. 295). The petitioner has been prejudiced by the Court's refusal. Petitioner excepted (R. 233).

The Circuit Court held that under Rule 49—Federal Rules of Civil Procedure—the Trial Judge has full, uncontrolled discretion in the matter and that, therefore, the Circuit Court could not hold that the Trial Judge erred when, as here, for any reason or for no reason whatever, he refuses to demand a special verdict (R. 332, 333). This, in spite of the fact that the Circuit Court also stated that it was undeniable that the verdict in the present case affords no satisfactory information about the jury's findings, and that such Court deems a special verdict usually preferable to a general verdict (R. 311, 333).

It is respectfully submitted that the Circuit Court erred in not considering such a situation as coming within the general rule that any discretionary matter is reviewable if there has been an abuse of that discretion in the light of existing circumstances.

Charles D. Newton v. *Consolidated Gas Company of New York*, 259 U. S. 101; 66 L. Ed. 845;

> "Having regard to these general principles and the special value of knowledge possessed by the trial court, much weight must be given to its opinion. Ordinarily we may not substitute our judgment for its deliberate conclusions, nor interfere with the exercise of its discretion. But when that court falls into error, which amounts to abuse of discretion, and the cause comes

here by proper proceedings, appropriate relief must be granted."

A. Howard Myers, et al. v. *Bethlehem Ship Building Corporation,* 303 U. S. 41; 82 L. Ed. 638;

Central Trust Co. of New York v. *United States Light & Heating Co., et al.,* 233 Fed. 420 (Second Circuit).

At page 421:

"Even if the matter be one of discretion it is appealable, if the appellant maintain that discretion was abused. *Central Trust Co.* v. *Chicago, Rock Island, etc., Co.,* 218 Fed. 336, 134 C. C. A. 144. It is held that appeal lies."

United States v. *Haupt,* 136 F. (2d) 661 (Seventh Circuit).

At page 672:

"This discretion, however, like any other vested in the trial court is, if abused, subject to review and correction."

City of New Orleans v. *Malone,* 12 F. (2d) 17 (Fifth Circuit).

Conclusion

It is, therefore, respectfully submitted that this case calls for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the judgment of the Circuit Court below.

WILLIAM C. COMBS,
Counsel for Petitioner.